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Supreme Court of the United States

OCTOBER TERM 1958.

No. 642

ELEANORE M. LOEB,

Petitioner,

against

WILLIAM LOEB,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement.

This brief is submitted in opposition to petitioner's application for a writ of certiorari to the Court of Appeals of the State of New York jointly with or in the alternative to the Supreme Court of the State of New York, County of New York.

This action was commenced in the Supreme Court, New York County, by petitioner Eleanore M. Loeb by levy pursuant to an order of sequestration dated November 23, 1954. The complaint prayed for a decree of separation or divorce and included a demand for alimony and an allowance for the maintenance of the issue of the marriage, together with such other relief as petitioner might be entitled to under Sections 1170-a and 1170-b of the Civil Practice Act (10-66). On the trial petitioner made no attempt to challenge the validity of a decree of divorce

obtained by the respondent in Nevada in 1952 and rested her case wholly upon the Provisions of Section 1170-b of the Civil Practice Act.

The trial court dismissed the complaint on the merits and its judgment was unanimously affirmed without opinion by the Appellate Division. The Court of Appeals affirmed with two judges dissenting. Petitioner's motion for reargument was denied without opinion.

Statement of Facts.

The facts which we regard as material, many of which were stipulated, can be summarized as follows:

The parties to this action were married in Connecticut in 1942 (118) [References are to folios of the Record on Appeal printed for use by the Court below]. At that time petitioner was a riding instructor at a girls' boarding school in Virginia, although she testified that she was living with a Mrs. MacDonald in Jericho, New York (155-156). The petition erroneously states (p. 6) that both parties were residents of New York when they were married. In fact, at that time respondent was a resident of Vermont, and had been since 1941, as established by the stipulation of facts (119). Respondent was then and continues to be a publisher of newspapers in Vermont and New Hampshire.

The parties established their first and only matrimonial residence in 1945 in South Windham, Vermont, where they purchased a house (120). In 1948 the only child of the marriage was born (119). In June 1951 respondent left the house at South Windham, Vermont (120). Since April 24, 1952, he has maintained his only residence and place of abode in the State of Nevada and intends to continue to reside in and make Nevada his home indefinitely (130).

Petitioner sold the house in Vermont and left there in August 1953, going to Oyster Bay, N. Y., to live with respondent's mother (180). Petitioner testified that in the summer of 1953 she intended to make Vermont her permanent residence but that in October 1953 she decided that she was going to live in New York (195). In this connection it should be noted that at the time she left Vermont petitioner filed with the Town Clerk of South Windham a statement "that I shall retain my well-established residence in the Town of Windham, Vermont" (198-199, 250); and that she paid poll tax in Vermont as late as May 5, 1954 (203).

At no time during the existence of the marriage did the parties maintain any residence or place of abode within the State of New York (125). At no time since the parties were married has respondent had any business, source of income or property within the State of New York except for certain funds held in escrow by his attorneys and certain securities and cash held by a New York bank as collateral for a loan (132).

On July 11, 1952, more than one year before petitioner came to live in New York, respondent obtained a decree of divorce from petitioner in the State of Nevada (133-137). Petitioner was served with process outside Nevada and did not appear in the action (134). Under the decree the parties were "freed and released from the bonds of matrimony and all of the duties and obligations thereof" (137). Respondent remarried shortly thereafter (120).

In 1953 petitioner commenced an action against respondent in the Windham County Court of the State of Vermont. Respondent appeared in the action, in which, after various amendments to the pleadings, the Court was confronted with an application by petitioner for an order for the support and maintenance of herself and of Penelope, the

sole issue of the marriage. By order dated March 20, 1954, the trial court made an allowance of $450 per month for the support of the child and, although finding that the Nevada divorce decree was entitled to full faith and credit, the court awarded alimony to petitioner in the amount of $350 per month (138-143). On appeal, the Supreme Court of the State of Vermont reversed the order of the County Court insofar as it awarded alimony to petitioner and otherwise affirmed. The Court held that the Nevada divorce decree was entitled to full faith and credit and that, being no longer a wife, petitioner was not entitled to alimony under the statutes or common law of Vermont (*Loeb* v. *Loeb*, 118 Vt. 472).

The question which petitioner asks this Court to decide is whether any state in which a former wife catches her husband after a valid *ex parte* divorce is required by the Constitution to entertain a cause of action for alimony. (See Frankfurter, J., dissenting, *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 425).

As her reason for invoking the jurisdiction of this Court, petitioner asserts that the Court below has decided a federal question of substance in a way probably not in accord with the decision in the *Vanderbilt* case (354 U. S. 416). It is her contention that Section 1170-b of the New York Civil Practice Act, as interpreted by the New York Court of Appeals, is unconstitutional under Article IV, Section 2, of the Constitution of the United States and Section 1 of the Fourteenth Amendment.

In her amended complaint petitioner alleged that she was entitled to relief by reason of the Equal Protection clause of the Fourteenth Amendment (71). Apart from this, no constitutional argument of any kind was presented to any of the courts below in any form until petitioner applied to the Court of Appeals for reargument.

POINT I.

Section 1170-b of the New York Civil Practice Act as interpreted by the Court below does not discriminate unconstitutionally against petitioner.

Much of petitioner's argument is devoted to a criticism of the manner in which the Court of Appeals has interpreted the governing statute. Since that Court's views regarding the legislative intent are not reviewable here, we shall confine ourselves to a brief statement of our reasons for submitting that no substantial question has been presented concerning the constitutionality of the statute as interpreted and applied below.

a. The Privileges and Immunities Clause of Article IV, Section 2, of the Constitution was mentioned for the first time in petitioner's application for reargument in the Court of Appeals. This was too late to justify review by this Court. *Herndon* v. *Georgia*, 295 U. S. 441, 443. But in any event this provision of the Constitution lends no support to petitioner's argument. The clause does no more than prevent a state from discriminating against citizens of other states in favor of its own. See *Hague* v. *C. I. O.*, 307 U. S. 496, 511. The case at bar involves no such discrimination against citizens of other states for the obvious reason that petitioner is not a citizen of another state but, on the contrary, claims vigorously to have been domiciled in New York since a time prior to the commencement of the action. Indeed, the Court's decision as to the scope of Section 1170-b is in no sense predicated upon the state citizenship of the former wife; taking the view most favorable to petitioner, the decision results in a differentiation between those wives who are residents of New York at

the time of the divorce and those who are not. State citizenship is a wholly irrevelant factor. If this amounts to discrimination against non-residents, no constitutional difficulty is presented, for a "distinction of privileges according to residence may be based upon rational considerations . . ." See *Douglas* v. *New York, New Haven & Hartford Railroad Company*, 279 U. S. 377, 387 (1929). It was there held not unconstitutional for a state to deny access to its courts to non-residents, since residence and citizenship are not equivalents, and "there are manifest reasons for preferring residents in access to often overcrowded courts . . ." Plainly there are "manifest reasons" for preferring "New York wives" in granting the unusual relief contemplated by Section 1170-b.

b. As for the Privileges and Immunities Clause of the Fourteenth Amendment, the argument is no stronger, even assuming that the point was made below and is properly before this Court. While the precise content of the fundamental rights of United States citizens protected by the clause may not be settled, it is fantastic to suggest that the clause confers upon every American ex-wife an unqualified right to obtain a support decree in any state of the Union without regard to her relationship to the forum which she selects.

c. To the extent that petitioner's contention is based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, her position is equally flimsy. The Fourteenth Amendment requires only that there be some rational basis for any classification created by state statute. This Court has said: "Indeed, it has long been the law under the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it' " (*New York Rapid*

Transit Corp. v. *City of New York*, 303 U. S. 573, 578). Surely the interest of New York in the protection of wives and families deserted here provides a rational basis for the classification which the Court below found to be the intention of the Legislature in the enactment of Section 1170-b.

POINT II.

No decision of this Court supports petitioner's argument that New York is obligated to provide for her.

According to petitioner's theory, the so-called "divisible divorce" doctrine imposes a constitutional obligation upon the State of New York to award alimony to petitioner and to all other former wives whose husbands obtain valid *ex parte* divorces and who thereafter settle in New York. We are told that because New York *may* under certain circumstances provide for the payment of alimony to former spouses (see *Estin*, 334 U. S. 541, and *Vanderbilt*, 354 U. S. 416), it follows that the State *must* do so. We do not know whether this leads to the conclusion that every state is required by the Constitution to enact legislation similar to Section 1170-b or whether it means only that if a state awards relief to some ex-wives under some circumstances it must award relief to all ex-wives under all circumstances. In either event, a more startling *non-sequitur* would be difficult to imagine. The *Estin* and *Vanderbilt* cases hold no more than that a decree of divorce which is entitled to interstate recognition as regards status does not necessarily have any effect upon the wife's right of support. Neither these nor any other decisions of this Court known to us stand for the proposition for which petitioner contends. It may well be sound policy to require husbands to

support former wives whom they have divorced, but surely it is for each state to determine its policy in this regard and to decide whether to extend protection to all such wives or only to those in whom it has a special interest.

Conclusion.

The only federal question in this case is whether the New York courts could properly have applied Section 1170-b to the peculiar facts of this case. Respondent presented this question below, and the existence of constitutional difficulties was noted in the opinion of the Court of Appeals (Appendix to Petition for Certiorari, p. A-5). That Court's decision in favor of respondent made these difficulties academic, and we submit that petitioner has patently failed to raise a federal question of substance for consideration by this Court.

The petition for certiorari should be denied.

Respectfully submitted,

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Dated: January 28, 1959.